APPENDIX "A."

Los Angeles, California, March 28, 1968

Meacham v. Department of Alcoholic Beverage Control. No. 32915.

Petition for Writ of Review Denied
Clay Robbins, Clerk
Court of Appeal, Second District
California State Building, Room 1201
Los Angeles, California

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
May 15, 1968

Dear Sir: I have this day filed Order HEARING DENIED.

In re: 2 Civil No. 32915, Meacham vs. Department of Alcoholic Beverage Control.

Respectfully

William I. Sullivan, Clerk

APPENDIX "B."

Opinion.

Before the Alcoholic Beverage Control Appeals Board of the State of California.

In the Matter of the Accusation Against Montell R. Meacham, Barbary Coast, 14320 South Western Avenue, Gardena, Los Angeles County, California, On-Sale beer license, Respondent, under the Alcoholic Beverage Control Act. AB-2976. File No. 64523. Reg. 2839.

In a decision issued by the Department of Alcoholic Beverage Control in accordance with the provisions of Government Code section 11517 (c), the Department of Alcoholic Beverage Control on October 2, 1967, found and determined that appellant used the services or "topless" waitresses and barmaids to serve beer in connection with the operation of the licensed premises, thereby establishing cause for discipline under section 24200(a) of the Alcoholic Beverage Control Act and article XX, section 22 of the California Constitution. A penalty of suspension of the license for 45 days with 15 days stayed upon conditions was imposed.

The department's decision contains the follows:

"FINDINGS OF FACT

"COUNT I

"1. It is true that on August 25, 1966, respondent licensee at and in the above-designated licensed premises did employ and use the services of a female, Carol Jean Johnson, and did permit and suffer the said female to tend bar and wait on

patrons while attired in bikini pants with her breasts fully exposed to public view.

"2. It is true that on September 29, 1966, respondent licensee at and in the above designated licensed premises, did employ and use the services of a female, Carol Jean Johnson, and did permit and suffer the said female to tend bar and wait on patrons while attired in bikini pants with her breasts fully exposed to public view.

"3. It is true that on October 6, 1966, respondent licensee at and in the above designated licensed premises, did employ and use the services of two females, Margie Gillispie and Josephine Flores, and did permit and suffer the said females to tend bar and wait on patrons while attired in bikini pants with their breasts fully exposed to public view.

"At the time respondent permitted his employees to perform their duties in attire which left their breasts fully exposed to public view, the respondent was aware that the Department of Alcoholic Beverage Control regarded such conduct as contrary to public welfare and morals.

"DETERMINATION OF ISSUES PRESENTED

"By reason of the foregoing facts set forth under Court I above, grounds for suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22 of the State Constitution, and Section 24200(a) of the Business and Professions Code.

"ORDER

"The license is suspended for 45 days with 15 days of said suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made the Director of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed portion of the penalty; and that should no such determination be made, the stay shall become permanent."

The essential facts of the case are not in dispute since the matters alleged in subparagraphs 1, 2, and 3 of count I were stipulated as being true by both parties at the hearing conducted by the Office of Administrative Procedure on May 26, 1967. (R. T. 2.)

Appellant's appeal is based upon all statutory grounds. (Section 23084 Alcoholic Beverage Control Act.)

The question presented by this appeal is the authority of the department to proceed against a licensee, by means of an accusation, because the licensee employed "topless" waitresses to serve alcoholic beverages to patrons, this employment of "topless" barmaids not being contrary to any statute or department rule.

This appeals board has sustained the authority of the department to proceed against a licensee in such situations. (See especially Montell R. Meacham (doing business as Barbary Coast), AB-2648; Boreta Enterprises, Inc., AB-2519 and AB-2544; R&C Enterprises, Inc., AB-2614; Caskey, AB-2620; and Aguilera, AB-2631.)

Appellant maintains that the accusation is indefinite and uncertain and that no acts or omissions are charged except "acts contrary to public welfare or morals." This latter phrase, according to appellant, is so uncertain that an effective defense is impossible; in addition, appellant challenges the constitutionality of article XX, section 22 of the California Constitution and section 24200(a) of the Alcoholic Beverage Control Act.

In the Caskey case (AB-2620), we considered these same arguments and stated:

". . . Appellant makes the argument that the constitutional provisions granting the department the right to suspend or revoke a license upon the determination that 'continuance of such license would be contrary to public welfare or morals' is unconstitutionally vague and uncertain. Our attention has been directed to no case in which the validity of article xx, section 22 on this point has been presented. The authority of the department to proceed directly under this constitutional provision without alleging the violation of any specific statute or rule has been recognized. Thus in *Mack v. Dept. of Alcoholic Bev. Control,* 178 Cal. App. 2d 149, 2 Cal. Rptr. 629, relating to bookmaking activities on the licensed premises by the bartender, the department proceeded directly under the provisions of section 24200-(a) (public welfare and morals). The same was true in the cases of *Quilici v. Dept. of Alcoholic Bev. Control,* 178 Cal. App. 2d 549, 3 Cal. Rptr. 49; *Munro v. Alcoholic Bev. Control Appeals Bd. & Weiss,* 181 Cal. App. 2d 162, 5 Cal. Rptr. 527; and *Harris v. Alcoholic Bev. Control Appeals Bd. & Roundhouse,* 197 Cal. App. 2d 172, 17 Cal. Rptr. 315. While in each of these cases there was a penal statute prohibiting the

conduct involved, this distinction may not be as substantial as it first appears for the misconduct did not relate to the sale of alcoholic beverages and there is nothing in the Constitution, the Alcoholic Beverage Control Act, or the department rules that informs a licensee that he may be held responsible for the unlawful conduct of his employee in the absence of an allegation and a finding, supported by the evidence, that the licensee permitted said unlawful conduct.

"The case of *Vallerga v. Dept. of Alcoholic Bev. Control,* 53 Cal. 2d 313, 1 Cal. Rptr. 494, deals with this question to some extent. There the department had proceeded against the licensee under the provisions of section 24200(e) of the Alcoholic Beverage Control Act forbidding a licensee to permit his premises to become a '"resort" for . . . prostitutes, pimps, panderers or sexual perverts.' The Supreme Court held this statute to be unconstitutional as violative of the 'good cause' requirement of article XX, section 22. In the course of its opinion, the court stated:

> "'The foregoing is sufficient evidence of a display of sexual desires and urges which, when made in public place as a continuing course of conduct, could reasonable be found by the trier of fact to be "contrary to public welfare and morals." It is apparent in the present case, however, that the foregoing evidence was not relied upon by the finder of fact in arriving at the conclusion that continuance of the license would be contrary to public welfare or morals. . . .'
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> "'Section 22, article XX of our Constitution vests the Department of Alcoholic Beverage Con-

trol with authority to institute disciplinary proceedings against a licensee and to revoke his license upon determination "for good cause" that the continuance of such license would be "contrary to public welfare or morals." Nothing we have herein stated is to be construed as infringing upon such authority. . . .'

"In the recent United States Supreme Court case of *Seagram v. Hostetter,* 86 S. Ct. 1254, an attack was made upon the 'minimum price' provisions of the New York liquor control law upon the ground, among others, that the statutory definition of 'related person' was unconstitutionally vague. In dealing with this question, the court, in quoting from an earlier case, stated in part:

"'"... we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or acertainable so as to survive challenge on the grounds of unconstitutionality." . . .'

(See also *Securities Comm. v. Chenery Corp.,* 332 U.S. 194.)

"The primary goal of the department in bringing disciplinary action against its licensees is to keep the regulated industry clean and wholesome. Where this is done by the application of a standard which is easily ascertainable and clearly understood by the industry, it is our opinion that the department has acted within its constitutional authority."

Appellant contends that the department has proceeded upon the authority of its policy manual prohibiting the use of "topless" waitresses, and this expression of policy

may not properly be used as a basis for discipline. We find no merit to this contention. The accusation and the decision of the department recite as authority for the department's proceeding, article XX, Section 22 of the Constitution and Section 24200(a), Alcoholic Beverage Control Act; the department's decision must stand or fall upon the authority of these provisions. Any reference to its policy manual could not save the decision. Nor can any expression in the policy manual defeat the department's authority to proceed if it has authority under the Constitution and statute. We have held that such authority is conferred by the Constitution and statute.

In the Boreta Enterprises, Inc. case, AB-2519, we stated as follows:

"The regulatory power of the Director must be exercised in such a manner as to take into consideration the welfare of the public as a whole in the light of the conditions that existed at the time of the hearing. (*Hasselbach v. Dept. of Alcoholic Bev. Control,* 167 Cal. App. 2d 662, 334 P. 2d 1058 (1959).) It is not unreasonable for the Director to determine that permitting waitresses, with their breasts exposed, to serve alcoholic beverages is incompatible with the public welfare and morals. Conditions under which alcoholic beverages may be dispensed are subject to state control (cf. *Seagram v. Hostetter,* 86 S. Ct. .... (1966) 34 U.S. Law Week 4355). Further, even children may come upon these premises since it is licensed as a bona fide public eating place. However, that need not be administratively significant here unless the Director deems to be so. Suffice to say that the Director may find that any warnings or notices given by the licensees to

prospective patrons to advise them of the manner in which alcoholic beverages are purveyed on the premises constitutes advertising and serves to encourage the intemperate use of alcoholic beverages, and tends to incite illegal activity. The Director may use common sense and practical understanding in relating the influence of the use of alcoholic beverages on human conduct to specific situations. He is not only empowered, but directed, to take preventive action to forestall such situations in connection with the sale of alcoholic beverages. The Director may properly decide that the threat of such contingencies establishes a basis for concluding that the continuance of a license under these circumstances would be contrary to public welfare and morals. (*Mercurio v. Dept. of Alcoholic Bev. Control,* 144 Cal. App. 2d 626, 301 P. 2d 474 (1956).) The Director may take such action permitted by the Constitution and the statute to enforce that decision. This raises the question whether the Director employed a procedure within his authority in deciding this case."

In answer to appellant's contention that the department's accusation is an unlawful restraint of freedom of expression, this board reiterates its previous statement on this issue. (See Boreta Enterprises, Inc., AB-2519.)

We said in that case that the guarantees of freedom of speech and expression in the Federal and State Constitutions do not limit the authority of the Director to suspend or revoke the license to sell alcoholic beverages if the licensee persists in selling alcoholic beverages by employing waitresses who serve such beverages with bared breasts.

The Department is legally vested with authority to regulate the highly sensitive alcoholic beverage industry. Where, as here, the department properly exercised the police power of the state by a procedure affording due process of law, there is no error.

In view of the foregoing, the decision of the department in the present proceeding is hereby affirmed.

Donald R. Wagner, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur: Robert I. Tuttle, Adrienne Sausset, Sacramento, California, February 14, 1968.

Filed February 21, 1968, Alcoholic Beverage Control Appeals Board.